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No. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL MOORE, ET AL.,
Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE, AND BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE FOR RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Right to Work (NRTW) Legal Defense Foundation respectfully moves for leave to file the annexed brief as amicus curiae and would show the Court as follows:

1. Interest of Amicus Curiae:

The National Right to Work Legal Defense Foundation assists the individual's enforcement of rights to work, association, speech and to other fundamental liberties infringed by compulsory unionism arrangements. The Foundation acts to protect both organized

and unorganized workers who resist unlawful compulsion to join or assist labor organizations.

The issues in this case have major ramifications for employees faced with discrimination and violence because they choose to work and associate on premises of equality with others who chose to belong to a labor organization. The problem of violence in this country attributable to a worker's exercise of protected choice to pursue a lawful nonconforming course is alarming. If 42 U.S.C. § 1985(3) is interpreted to protect members of all recognizable classes against private conspiratorial interference with freedom of association, then all workers will benefit.

2. Purpose of this Brief:

The Foundation's brief amicus curiae addresses particularly the questions whether non-union workers can be a "class" subject to invidiously discriminatory designs of a lawless, private group and whether resulting deprivations of federal rights are remediable under 42 U.S.C. § 1985(3). The brief suggests an analytical framework to apply to the animus element of the statute in order to provide a remedy to those persons within the intendment of Congress while avoiding the potential for § 1985(3) to become a font of "general federal tort law."

The Foundation avoids duplication of the issues and arguments already adequately briefed. However, the Foundation cannot avoid adding to the historical considerations and public policy arguments bearing upon the proper interpretation of the "class-based animus" requirement of the statute. These considerations—historical and policy alike—underpin the proposed analy-

sis by focusing upon the conspiratorial purpose, or design, and the causal effect upon equality of opportunity and personal choice which the 42nd Congress sought to secure.

The Foundation respectfully submits that it can and will fully advocate the rights of workers to have their associational choices respected without fear of coercion or violence.

FOR THESE REASONS, NRTW Legal Defense Foundation requests that it be granted leave to file the attached amicus curiae brief.

Respectfully submitted,

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BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of the "amicus curiae" is contained in the Motion For Leave to File this Brief and adopted herein.

SUMMARY OF ARGUMENT

The class-based animus requirement of § 1985(3) is tested and satisfied in the analysis of the conspirator's purpose or design rather than in the analysis of the plaintiff's criterion for membership in some well defined class deemed protected. The history behind the

statute—Congress' intention to secure the Thirteenth and Fourteenth Amendment power of the federal citizen to compete for economic and personal opportunity—demands a flexible treatment of the class requirement. A conspiracy designed and implemented to have the natural consequences of foreclosing opportunities to citizens to use their skills, to contract for compensation, to perform a contract of employment, and to choose their associates in the personal experiences of life is class-based in the view of the 42nd Congress. Such a conspiratorial presence in a free society deprives the object of legal equality and relegates the target to inferior status. That is the invidiously discriminatory class animus that § 1985(3) proscribes and remedies.

ARGUMENT

THE LOWER COURTS AND THE BAR NEED AN ANALYTICAL FRAMEWORK AND DIRECTION IN APPLYING THE CLASS-BASED INVIDIOUSLY DISCRIMINATORY ANIMUS REQUIREMENT OF A § 1985(3) CLAIM

The class-based discriminatory animus requirement of § 1985(3) has proven to be the most elusive and the one most inconsistently treated by the lower courts. A workable analysis by this Court of the discriminatory animus requirement will enable the lower federal courts to more consistently apply 42 U.S.C. § 1985(3) and justly grant the protections of federal law to those whom the 42nd Congress intended to protect.

A PLAINTIFF SEEKING § 1985(3) REMEDIES NEED SHOW THE CONSPIRATORIAL DESIGN OR PURPOSE, AND THE PROXIMATE EFFECT OF AN IMPLEMENTING ACT UPON PROTECTED RIGHTS. THE OBJECT OF THE CONSPIRACY, NOT THE ATTRIBUTES OF THE VICTIM, DETERMINES THE CLASS

Class-based animus should be tested by taking two necessary and sufficient factors into account. First, the Court should look to the purpose of the conspirators. Did a constitutionally relevant animus lead them to commit their injurious acts? The Court's analysis would focus upon the *aim* of the conspirator to determine if the conspiracy was designed to interfere with the exercise of fundamental rights.

Second, the Court should determine whether the conspiracy had the *effect* of interfering with the victim's exercise of fundamental rights. The question is whether the rights or privileges allegedly deprived—such as the rights of free speech and association—are ones which the 42nd Congress protected from infringement by either state or private actors.

Once a court determines that the conspirator's aim is to interfere with the exercise of a protected right, and that right is one that the victims of the conspiracy are attempting to exercise, then the Court should conclude that the remedial protection of § 1985(3) is properly invoked to protect those victims. The universe of protected victims should be identified by their inclusion in the target area of the conspiracy rather than their possession of immutable characteristics or membership in a defined group. Thus, an individual who is harmed because he exercised those protected rights which the conspiracy aims to destroy is entitled to the statute's remedies even though he alone has been harmed. The focus of the test is, thusly,

upon the object and scope of the conspiracy not the personal characteristics of the victim. A test such as this would simplify the job of the lower courts in applying this statute while still retaining a constitutionally based discriminatory animus requirement.

In *Griffin* v. *Breckinridge,* 403 U.S. 88 (1971) the Court implied that the analysis of class based discriminatory animus should begin with the conspirators' design: "The conspiracy, in other words, must *aim* at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.,* 102. In *Griffin* the conspirators' animus was directed against blacks who engaged in civil rights work. The complaint alleged, on the one hand, that plaintiffs were *not* civil rights workers and, on the other hand, that defendants *believed* (mistakenly) that they were civil rights workers. The court did not find improper allegations of class-based discriminatory animus. To the contrary, the Court indicated that class-based animus must be determined from the perspective of the conspirator. Plaintiffs, therefore, need only show what distinctions the conspirators focused upon to mark them for inferior status. Plaintiffs need not show that they belong to some stable, objectively defined group often mistakenly delineated in numerosity terms. *See, e.g., Rodgers* v. *Tolson,* 582 F.2d 315 (4th Cir. 1978); *Bricker* v. *Crane,* 468 F.2d 1228 (1st Cir. 1972).[1] Indeed, the

[1] Amicus does not assert that the conduct of the victims invoking the statute is irrelevant. The conduct of the victims will often provide proof of what constitutionally protected right the conspirators aimed at depriving. In *Glasson* v. *City of Louisville,* 518 F.2d 899 (6th Cir.), *cert. denied,* 423 U.S. 930 (1975) the court implicitly recognized that it is the aim of the conspirators which is primary but the conduct of the victims will provide a means of identifying the discriminatory animus. *Id.,* 912.

very concept of class in a free society embodies the notion of equality of opportunity for movement to another class; and, equal chance for personal life experiences is determined by any individual's power, such as the power to dispose of one's skills for the sake of income. *See, e.g.*, H. Gerth & C. Wright Mills, *From Max Weber: Essays in Sociology*, p. 181 (Oxford U. Press, 1946).

The legislative history of the statute supports the view that it is the discriminatory purpose of the conspirators which contributes to liability under the statute. Senator Edmunds stated "[W]e do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or a set of men against another . . . but, if in a case like this, it should appear that this conspiracy was *found against this man because* he was a Democrat . . . or *because* he was a Catholic . . . or *because* he was a Vermonter . . . then this section could reach it." Cong. Globe, 42nd Cong., 1st Sess. 567 (1871) (emphasis added). These comments strongly support the position that the purpose of the conspirators was a major factor in finding a cause of action under the statute. If the aim of the conspirators is to burn a barn only for the sake of arson, no violation of the statute could be shown. But, if the act of barn burning results from a purpose to harm owners because they are black, or chose membership in a certain political party or voluntary social organization, then the constitutionally relevant animus requirement would be satisfied. Congress intended to secure the individual's power to embrace opportunity and to give each citizen an equal chance for personal experience free of usurping conspiratorial purposes.

SECTION 1985(3) PROSCRIBES A CONSPIRACY THAT AIMS TO DEPRIVE ANYONE OF FREE CHOICE TO LIVE AND WORK IN A PARTICULAR PLACE, TO EARN AND PURSUE A LIVELIHOOD, TO ENTER AND PERFORM CONTRACTS TOWARDS THESE PURPOSES, AND TO ASSOCIATE

The Court should consider the Thirteenth Amendment and the privileges and immunities clause of the Fourteenth Amendment as historical sources of the rights infringed by the petitioners. Congress acted through these amendments to safeguard private rights inadequately protected prior to the Civil War. The amendments authorize Congressional enforcement of the rights granted. Those rights, federal rights, are at stake in this case.

Section 2 of the Thirteenth Amendment authorized Congress to regulate private conduct in order to abolish all badges and incidents of slavery and to "vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." *Civil Rights Cases,* 109 U.S. 3, 22, 23 (1883). *See also Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 440, 442-43 n.78 (1968) (overruling *Hodges* v. *United States,* 203 U.S. 1 (1906)). Section 5 of the Fourteenth Amendment authorizes Congress to protect the privileges and immunities of national citizenship. These include rights of substantive liberty as contemplated in the preamble to our constitution. *United States* v. *Guest,* 383 U.S. 745, 762, 782 (1966); *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966).

The right to work and the right to seek opportunity to work in each geographical area of the country free of unlawful coercion is a precious liberty. *Barsky* v.

Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting); *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 102 (1976). *See also Slaughter House Cases,* 83 U.S. (16 Wall.) 36 (1873) (right to carry on lawful trade is a fundamental right of citizen).

Liberty means not only the freedom to live and work where one wills, but also the freedom to earn and pursue a livelihood and to enter into and perform contracts necessary to carry out these purposes. Nothing is more fundamental to the rights of free men and "the essence of citizenship." The power to make and perform contracts of employment was an essential distinction between free men and slaves. *Jones* v. *Alfred H. Mayer,* 392 U.S., at 420-37.

Furthermore, it is apparent that the type of institutionalized and recurrent violence that was directed against the respondents was the very type of violence which the 42nd Congress intended to remedy. Its intent was to secure the opportunity for contractual and associational equality threatened by private lawlessness and violence "post bellum." The individual respondents chose to exercise constitutional and statutory rights according to their individual beliefs. The perpetrators' violent acts arose from their refusal to respect respondents' equal right to make these choices. Whatever analysis may be proper to achieve the Congressional intent, these rights are so precious that their individual exercise must be safeguarded. *NAACP* v. *Alabama,* 357 U.S. 449 (1958).

RESPONDENTS WERE INJURED BY A PROSCRIBED CONSPIRACY AND IT IS IMPORTANT TO THE EQUALITY OF ASSOCIATIONAL CHOICE TO CONFIRM THE AVAILABILITY OF § 1985(3) REMEDIES

Applying this proposed analysis to the instant case, it is apparent that respondents suffered a remediable injury. The conspirators' design was to drive respondents out of their jobs, out of business, and literally out of all opportunities in the geographic area solely because respondents chose to exercise their right not to join a union and their right to seek employment in a chosen place. Petitioners set upon a course of action designed to deprive respondents' equal right to exercise free speech, associational choices, and other liberty. The facts found below speak eloquently to the nature of the invidious animus.

Cross Construction Company offered employment and opportunity to compete solely on the basis of occupational skills without regard to union affiliation. *Scott* v. *Moore,* 680 F.2d 979, 983 (5th Cir. 1982) (en banc). However, local hostility developed against Cross employees because they had not entered into a union contract and had come from outside the community. *Ibid.* As a result of the conspiratorial acts and the resulting violence, some employees refused to work and Cross Construction Company defaulted in its contractual performance. *Id.,* 984. This was precisely the result the conspiracy intended to achieve.

Petitioners used means of intimidation and force to compel the Cross Company and its employees to abandon their right to work in the Port Arthur area of the United States and to desist from performing their employment and construction contracts. It is the conspiracy and its invidious design rather than

the means that brings this case into the federal sphere of protection. The conspirators intended to subject respondents to their will and to establish or maintain themselves as a majoritarian social and economic power in the community. They sought to deprive the equality of rights and privileges to any one who disagreed with them. It is because respondents sought to enjoy and exercise the same rights and privilages that petitioners enjoy and exercise—the right to live and work where one wills, to earn a livelihood, to contract to carry out these purposes, and to freely associate—that the conspirators aimed at them.

Differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equality under the laws. But, from time to time, other differences from the community norm may define other persons or groups which need the same protection. It was the aforementioned characteristics of choice—workplace and associational choices—that distinguished respondents from the community norm and animated the conspiracy. These characteristics are as clear and obvious a part of the conspiratorial design as would be the immutable characteristic of race. It is that design which 42 U.S.C. § 1985(3) properly proscribes and remedies.

The Court must take notice of the fact that the discriminatory animus visited upon this group of non-union workers is not a new or isolated instance in American history. The Federal and State Reporters overflow with old and new cases detailing the horrors of mass union violence directed at peaceful non-union employees, and "open shop" employers. The circumstances of the Altemose Construction Company riots

speak eloquently to this; and, furthermore, are strikingly parallel to the situation at Port Arthur. *See Altemose Construction Co.* v. *Bldg. & Const. Trades Council,* 449 Pa. 194, 296 A.2d 504 (1972); *Altemose Construction Co.* v. *NLRB,* 514 F.2d 8 (3d Cir. 1975). As in the instant case, unionized workers, in what was described by the Pennsylvania court as a "virtual military assault," chartered buses and descended upon the non-union (open shop) construction site. Property damage ranged into the hundreds of thousands of dollars, and serious bodily injury was inflicted on workers, security guards, police and firemen. A recitation of these facts indicates that such discriminatory animus, directed against workers with a different political and social point of view, is not uncommon.

These incidents of unionized mob violence have recurred at an alarming rate for decades. In addition to the *Altemose cases, see, e.g., Kayser-Roth Corp.* v. *Textile Workers Union,* 479 F.2d 524 (6th Cir. 1973); *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287 (1941); *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *American Metal Products Company, Inc.,* 408 S.W.2d 682 (Tenn. 1964); *United Construction Workers* v. *New Burnside,* 274 S.W.2d 787 (Ky. 1955); *United Mine Workers of America, District 31,* 95 N.L.R.B. 546 (1951). While economics may be a major factor in these violent disputes, it cannot be denied that individual constitutional rights are entangled.

To the extent that a decision in this case must be reconciled with national labor policy, *see, e.g., Connell Construction* v. *Plumbers and Steamfitters,*

421 U.S. 616, 624-25 (1975), a decision affirming the lower court will have a salutory effect. It will ensure labor stability consistent with federal labor policy. It will introduce certainty into the area of civil rights jurisprudence where it touches upon associational choices in the workplace. It will reduce mob violence by placing the perpetrators on notice that their victims will have a sure and complete federal remedy. Nothing in the labor policy of the United States, as expressed in the statutes and the decisional law of this Court, requires a finding that the Civil Rights Act was not meant, and should not be interpreted, to give a remedy under the facts of this case.

CONCLUSION

For the foregoing reasons, and for those reasons expressed by respondents, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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